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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77 - 1819

NORMAN VAUGHN, FREDDIE BROUSSARD, AND LARRY J. BROUSSARD,
Petitioners,

v.

VERMILION CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR RESPONDENT

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INDEX

PAGE

Table of Authorities iv

Jurisdiction 1

Questions Presented 2

Statement 3

Summary of Argument 4

Argument 7

I. Certiorari Was Improvidently Granted, This Court Is Without Jurisdiction, And the Writ Should Therefore Be Recalled.

A. Petitioners Claim to Rights and Privileges Under the Louisiana Organic Act Was Not Properly Raised in the State Court Proceeding and Is Therefore Not Before This Court. 8

B. A Private Right of Action Does Not Exist on Behalf of Petitioners Under the Rivers and Harbors Act in the Absence of Action by Congress or Its Delegate 9

II. The Navigation Servitude Is Distinct and Separable From And Is Narrower Than Federal Regulatory Jurisdiction

INDEX (Continued)

PAGE

A. Federal Power Over Navigable Waters Has Many Legally Distinct Sources and Applications. 13

B. The Navigation Servitude Is More Limited in Purpose, Justification, and Scope Than Federal Regulatory Jurisdiction 20

C. The Exercise of Federal Power Over Navigable Waters is Limited by the Fifth Amendment to the United States Constitution. . . . 25

III. The Federally Protected Right of the Public to Navigate Over the Navigable Waters of the United States Has No Application to Respondent's Wholly Artificial Canal System

A. Respondent's Artificial Canals Constructed Entirely on Private Property at Private Expense Are Considered Private Under State and Federal Law 31

B. Private Artificial Canals Which Form No Highway of Interstate Commerce Are Not Subject to the Federal Navigation Servitude Merely Because They Are Navigable In Fact and Intersect With Navigable Waters of the United States. 39

INDEX (Continued)

PAGE

C. Respondent's Artificial Canal System Did Not Destroy or Obstruct Navigable Waters of the United States and This Issue Is Not A Disputed Fact 45

IV. There Are Compelling Policy Considerations Why the Federal Navigation Servitude Should Not Be Extended To Respondent's Privately Constructed Canal System Upon Its Private Lands. 50

Conclusion 56

TABLE OF AUTHORITIES

PAGE

CASES:

Bass Angler Sportsman Society v. United States Steel Corp., 324 F.Supp. 412 10

Bass Anglers Sportsman Society v. Koppers Co., 447 F.2d. 1304 10

Beecher v. Alabama, 389 U.S. 35 9

Binney v. Chesapeake, etc., Canal Co., 8 Pet. (U.S.)101 36

Brewer Elliott Oil and Gas Co. v. United States, 260 U.S. 77..... 40

Cardinale v. State of Louisiana, 394 U.S. 437..... 8

Case v. The Midland Railway, 27 Beavan 247..... 34

Chicago, Rock Island, and Pacific Railroad Co. v. United States, 284 U.S. 80 25

Citizens Committee for Environmental Protection v. United State Coast Guard, 456 F.Supp. 101..... 11

Daniel Ball, The, 77 U.S. (10 Wall.) 557..... 15,29,39 44

TABLE OF AUTHORITIES (Continued)

PAGE

Dow Chemical Co. v. Dixie Carriers, Inc. 330 F. Supp. 1304, *aff'd.*, 463 F. 2d 120, *cert. denied*, 409 U.S. 1040..... 43

Dwinel v. Barnard, 28 Me. 554 47

Economy Light and Power Co. v. United States, 256 U.S. 113 17

Environmental Protection Agency v. State Water Resources Control Board, 426 U.S. 200 22

Ex Parte Boyer, 109 U.S. 629..... 18, 20

Fairchild v. Kraemer, 204 N.Y.S. 2d 823, 11 A.D. 2d 232..... 37

Farnum v. Blackstone Canal Corp., 1 Sumn. (U.S.) 46 36

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 11,14,37

Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 18

Goose Creek Hunting Club v. United States, 518 F.2d 579 40

Guinan v. Boston, Cape Cod and New York Canal Co., 1 F. 2d 239 18

TABLE OF AUTHORITIES (Continued)

	PAGE
Gulf and Interstate Railway Co. of Texas v. Davis, 26 F. 2d 930	40
Guthrie v. Alabama By-Products, 328 F. Supp. 1140, *aff'd*, 456 F.2d 1294	10
Hamilton v. Vicksburg, Shreveport and Pacific Railroad Co., 119 U.S. 280	20
Hardy Salt Co. v. Southern Pacific Transportation Co., 501 F.2d 1156, *cert. denied*, 419 U.S. 1033	43
Harrison v. Fite, 148 F. 781	40
Harvey v. Potter, 19 La. Ann. 264	31,36
Hooper v. United States, 331 F. Supp. 1056	11
Huse v. Glover, 119 U.S. 543	21, 47
Ilhenny v. Broussard, 135 So. 669	32, 47
King v. Muller, 67 A. 380, 73 N.J. Eq. 32	37
Leovy v. United States, 177 U.S. 621	42,44
Leslie Salt Co. v. Froehlke, 578 F.2d 742	22,40
Louisville Bridge Co. v. United States, 242 U.S. 409	21

TABLE OF AUTHORITIES (Continued)

	PAGE
Loveladies Property Owners Association v. Rabb, 430 F. Supp. 276, *aff'd*, 457 F.2d 1162, *cert. denied*, 432 U.S. 906	11
Lucky Lindy, The, 76 F.2d 561	18
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430	9
McKie v. Diamond Marine Co., 204 F.2d 132	18
Miller v. New York, 109 U.S. 385	41
Minnehaha Creek Watershed District v. Hoffman, 449 F. Supp. 876, *aff'd*, 13 E.R.C. 1009	43
Monogahela Navigation Co. v. United States, 148 U.S. 312	26, 28
Montello, The, 87 U.S. (20 Wall.) 430	15, 29
Morris v. Tennessee Valley Authority, 345 F.Supp. 321	10
National Audubon Society v. White, 302 So. 2d 660, *writ denied*, 305 So. 2d 542	32
Oklahoma v. Texas, 258 U.S. 574	18

TABLE OF AUTHORITIES (Continued)

PAGE

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 ..... 17, 22

Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363 18

Pennsylvania Coal v. Mahon, 260 U.S. 393 56

Pennsylvania Water and Power Co. v. Federal Power Commission, 123 F. 2d 155, *cert. denied*, 315 U.S. 806 40

Perrine v. Chesapeake and Delaware Canal Co. 50 U.S. (9 How.) 172 38

Perry v. Haines, 191 U.S. 17 23

Philadelphia Co. v. Stimson, 223 U.S. 605 47

Port of Seattle v. Oregon and Washington Railroad Co., 255 U.S. 56 18

Potter v. Indiana, etc. R. Co. 95 Mich. 389 54 N.W. 956 ..... 36, 41

Propeller Genessee Chief v. Fitzhugh, 52 U.S. (12 How.) 443 ..... 17, 44

Red Star Towing and Transportation Co. v. Department of Transportation, 432 F.2d 104 ... 11

TABLE OF AUTHORITIES (Continued)

PAGE

Scranton v. Wheeler, 179 U.S. 141 24,26,27

Shively v. Bowlby, 152 U.S. 1 18

Sierra Club v. Morton, 400 F.Supp. 610 11

Silver Springs Paradise Co. v. Ray, 50 F.2d 356 18

Simpson v. Attorney General, (1904) A.C. 476 34

Sneed v. Weber, 307 S.W. 2d 681 41

Southern Natural Gas Co. v. Gulf Oil Corp., 320 So. 2d 917 18

Steamboat Belfast, The v. Boon, 74 U.S. (7 Wall.) 624 17

Ten Eyck v. Delaware, etc., Canal Co., 18 N.J.L. 201 36

Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 F.680 40

Trenton Water Power Co. v. Raff, 35 N.J.L. 336 36

Union Bridge Co. v. United States, 204 U.S. 364 21

United States v. American Cynamid Co., 354 F.Supp. 1202, *aff'd.*, 480 F.2d 1132 44

TABLE OF AUTHORITIES (Continued)

PAGE

United States v. Appalachian Electric Power Co., 311 U.S. 377 ..... 16,18, 25, 29, 33

United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 22

United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 23

United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co., 312 U.S. 592 17,24,28

United States v. Cress, 243 U.S. 316 ..... 26,28,29, 30, 37

United States v. Grand River Dam Authority, 363 U.S. 229 ..... 17, 22

United States v. Holt State Bank, 270 U.S. 49 18

United States v. Joseph G. Moretti Co. 526 F.2d 1306 43

United States v. Kaiser Aetna, 408 F. Supp. 42, overruled in part, 584 F.2d 378, *cert. granted*, Docket No. 78-738 ..... 21, 33

United States v. Kansas City Life Insurance Co., 339 U.S. 799 ..... 24,25. 27,29

TABLE OF AUTHORITIES (Continued)

PAGE

United States v. President, etc., of Jamaica and R. Turnpike Co., 204 F. 759 43

United States v. Rands, 389 U.S. 121 ..... 24, 27, 28

United States v. Republic Steel, 362 U.S. 482 ..... 17, 22,27

United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 ..... 17, 21

United States v. Sexton Cove Estates, 389 F. Supp. 602, *aff'd*, 526 F.2d 1293 33,43,44

United States v. Stoeco Homes, Inc., 498 F. 2d 597, *cert. denied*, 420 U.S. 927 27,44

United States v. Standard Oil Co., 384 U.S. 224 ... 22

United States v. Twin City Power Co., 350 U.S. 222 17

United States v. Utah, 283 U.S., 64 ..... 18, 40

United States v. Virginia Electric and Power Co., 365 U.S. 624 ..... 17, 14

United States Geophysical Co. v. Vela, 231 F.2d 816 43

Utah, State of v. United States, 304 F.2d 23, *cert. denied*, 371 U.S. 826 40

TABLE OF AUTHORITIES (Continued)

PAGE

Veazie v. Moor, 55 U.S. (14 How.) 568. 37,39

Vermilion Corporation v. Vaughn, 356 So. 2d 551, *writ denied,* 357 So. 2d 558 . . . . . 44, 47

Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525 36

Ward v. Warner, 8 Mich. 508. 36

Wyndotte Transportation Co. v. United States, 389 U.S. 191. 21

CONSTITUTION, STATUTES, AND REGULATIONS:

U.S. Constitution, Art. 1, Section 8, Clause 3 (Commerce Clause). 11-17, 24-26, 33, 37, 39

U.S. Constitution, Art. 3, Section 2 (Admiralty Jurisdiction). 18-19,37

U.S. Constitution, Fifth Amendment 25-30,39

2 Stat. 701 et seq., La. Organic Act. 1,2,8, 20,39

2 Stat. 703 20

28 U.S.C. 1257 1,8

TABLE OF AUTHORITIES (Continued) . . . . . .

PAGE

33 U.S.C. 401 et seq., Rivers and Harbors Act 2,9-10,12 21,22,27

33 U.S.C. 1251, Water Pollution Control Act 22

33 C.F.R. 329.1 19

33 C.F.R. 329.3 19

33 C.F.R. 329.8 38,39

36 Opinion U.S. Attorney General 203 (1930). . . . 38

La. Code of Civil Procedure Art. 967 46

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Coulson, H, and U. Forbes, *The Law Relating to Waters* (4th Ed. 1924). 35

Earl of Halsbury, *The Laws of England,* 39:732 (1962). 35

Hale, Sir Matthew, *De Jure Maris,* Part I, Chapter 3 34

Leighty, Leighton L., *The Source and Scope of Public and Private Rights in Navigable Waters,* 5 Land and Water L. Rev. 391 (1970). 13

TABLE OF AUTHORITIES (Continued)

	PAGE
American and English Encyclopedia of Law, Vol. 5:111 (1897)	36
American and English Encyclopedia of Law, Vol. 28:1044 (1895)	36
Encyclopedia of Law and Procedure, 6:267 (1903)	35
13 Am. Jur. 2d, "Navigable Waters," § 92	37
12 C.J.S., "Canals," § 31	37
65 C.J.S., "Navigable Waters," § 20	36
A Guide To Wildlife Management Areas, Louisiana Department of Wildlife and Fisheries (1978)	51
Rockefeller Refuge Levee Study, Technical Report of The Louisiana Wildlife and Fisheries Commission (1959)	52, 54

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BRIEF FOR RESPONDENT

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. 1257 (3), providing for assertion of rights and privileges under the Constitution and Laws of the United States.

As to issues raised in Petitioners' brief under the Louisiana Organic Act, 2 Stat. 701 et seq., the applicability of that Act was neither pleaded, argued, nor decided below. Therefore a serious question exists as to whether jurisdiction properly lies in this Court, for it is essential to the jurisdiction of the Supreme Court under 28 U.S.C. 1257 that a substantial federal question has been properly raised in the state court proceeding.

As to issues raised under the Rivers and Harbors Act, 33 U.S.C. 401 et seq., there is serious question of the existence of a private right of action on behalf of Petitioners to claim protection of that act in the absence of a determination by Congress or the Corps of Engineers that "navigable waters of the United States" are involved.

These jurisdictional issues will be discussed further in the argument below.

QUESTIONS PRESENTED

1. Whether this Court may consider Petitioners' claim to rights or privileges arising under the Louisiana Organic Act, 2 Stat. 701 et seq., when the applicability of that act was neither pleaded, argued, nor decided below?

2. Whether in the absence of action by Congress or its delegate, a private right of action exists on behalf of Petitioners under the Rivers and Harbors Act, 33 U.S.C. 401 et seq, to seek a judicial determination that a private artificially created waterway, built on private property with private funds, which adjoins "navigable waters of the United States" is itself, by nature of such joinder, a "navigable water of the United States" subject to the right of use by citizens of the United States and that a state court injunction preventing such use is an obstruction under the language of the Act?

3. Whether a private landowner who constructs privately owned artificial canals at private expense exclusively upon his private property subjects such canals to unlimited and uncompensated access by members of the public solely because such canals are navigable in fact and intersect in some places with "navigable waters of the United States."

STATEMENT

Petitioners' "Statement of the Case" (Petitioners' Brief pages 1-7), while reasonably accurate in generally setting forth the factual and procedural context of the questions presented for review by this Honorable Court, requires correction and supplementation in several important respects.

The canals herein at issue were not constructed as, and do not form, a highway of commerce. They were constructed on lands leased to Respondent by a private corporation for the purpose of providing access to trap lines and in connection with drilling operations or mineral exploration thereon and are continuously dredged to provide access to drilling locations.[1] They do not provide access to the Gulf of Mexico.[2] Use of these canals has at all times been predominantly by Respondent and by its mineral, trapping, hunting and grazing lessees.[3] No governmental agency has ever sought to regulate or otherwise exercise jurisdiction over the canals; on the contrary, all governmental agencies have at all times acknowledged Respondent's rights of ownership and control.[4]

Nothing in the record supports the implication contained in Petitioners' Affidavit in Opposition to Respondent's

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1. Affidavits of Murphy Sellers, App. p. 12a, and John Donohue, App. p. 15a. Deposition of John Donohue, App. pp. 21a, 26a, 28a ("This has been an evolving canal system"); 45a (". . .these canals were all developed as the most expeditious means and way to get to a drilling location").

2. Deposition of John Donohue, App. pp. 33a, 43a-44a.

3. Deposition of John Donohue, App. p. 42a.

4. Deposition of John Donohue, App. p. 48a ("They've always sought permission before entering upon the property and have followed the usual courtesies,. . .").

Motion for Summary Judgment that development of the canals herein at issue caused preexisting waterways to become unusable. Mr. Donohue's deposition is clear and unequivocal that impassability of the only natural waterways which formerly opened to the Gulf resulted exclusively from accretion of silt from the Atchafalaya River westward in the case of a small drainage coulee and from the rerouting of Freshwater Bayou and construction of a public waterway in the case of a larger stream.[5] There is, accordingly, no basis in the record for the suggestion that "natural navigable waterways, once used as such, were impaired and destroyed by the artificial creations of a private corporate developer".[6]

The alleged connection of Respondent's canal system with naturally navigable waters and alleged destruction of such waterways by construction of Respondent's canal system were not plead in Petitioners' Answer and were not at issue in the trial court.[7] Destruction of existing navigable waterways is only implied in Petitioners' Affidavit in Opposition to Respondent's Motion for Summary Judgment wherein it is asserted that "various portions of the natural navigable waterway system . . .only ceased to be useable for these purposes after Humble developed its artificial waterway system." [8]

SUMMARY OF ARGUMENT

The Writ of Certiorari was improvidently granted since this Court is without jurisdiction. The Louisiana Organic Act was

5. Deposition of John Donohue, App. p. 33a ("[development of the Dewitt Canal] would not have had any effect on that."). App. p. 35a.

6. Petitioners' brief, p. 7.

7. Answer, App. pp. 8a-10a.

8. Affidavit in Opposition, App. p. 54a.

not raised by the Petitioner in the state courts and is, therefore, not properly before this Court. Jurisdiction based on the Rivers and Harbors Act is improper both because no private right of action exists under the act and because neither Congress nor its designee – the Corps of Engineers – has determined that the waters involved are navigable and, therefore, within the scope of the act. In the absence of such a finding, the State of Louisiana is free to enforce its trespass laws with the assurance that the doctrines of comity and separation of powers will bar interference.

If this Court does have jurisdiction, the judgment of the state court should be affirmed. As the term "navigability" has evolved in the jurisprudence, it has no uniform meaning, but is variable depending on the context in which it is applied. As this court has recognized, it may be as broad as the full regulatory authority of Congress under the Commerce Clause. But this Court has also recognized that when applied to the federal navigation servitude, derived from English Common Law, it is much narrower. It is the federal navigation servitude that is at issue in this case and that servitude should not be enlarged under the guise of federal regulation.

The Commerce Clause and the Rivers and Harbors Act, passed under its authority, are both limited by the Fifth Amendment. Since the Rivers and Harbors Act in some cases allows a taking without compensation, it is important to ascertain the limits that the Fifth Amendment places on federal powers. Respondent submits that that limitation is found in the case law which defines "navigability" for the federal navigation servitude as including only waterways of natural existence. Broader terms of "navigability" apply only for the regulatory powers of Congress and Admiralty Jurisdiction.

Under both State and Federal law the term "navigable waters of the United States," for purposes of the federal navigation servitude, does not include canals constructed with private funds and on privately owned land. Petitioners concede in their brief that such is the holding of the Louisiana Supreme Court, but assert that the court is on the "wrong side of the issue. . . ." The fallicy of this assertion is demonstrated by Petitioners' reliance on cases involving the regulatory powers of Congress under the Commerce Clause to support their conclusion rather than cases delineating the navigation servitude. From its origin in English Common Law until present day, the courts have consistently held that the navigation servitude does not extend to private canals built on fast land with private funds. Thus, it is Petitioners, not the Supreme Court of Louisiana, who come out on the "wrong side of the issue . . . ."

The mere fact that the canals built on fast land are navigable-in-fact is not enough to make them navigable-in-law for the purposes of the navigation servitude. This Court in defining the term "navigability" in relation to the navigation servitude has consistently qualified the term with the words "natural or ordinary condition," thus making it inapplicable to artificially created canals. Furthermore, the navigable-in-fact, navigable-in-law rule requires that the waterway be part of an interstate highway of commerce. Respondent's canals do not serve such a purpose; the only useful purpose of the canal system is to provide access for Respondent to its leasehold. The ebb and flow of the tide test of navigability, sought to be used by Petitioners, was abandoned in this country in 1870 and has been rejected by the courts ever since.

Although Petitioners and the Solicitor General assert that they have always maintained in this litigation that prior to

the development of Respondent's canal system there existed a natural highway of commerce, such is not the case. Such an allegation was not pled as an affirmative defense in Petitioners' Answer as required under Louisiana law. Furthermore, the allegation is simply not supported by the record. Little Freshwater Bayou was silted up prior to the construction of Respondent's canals. Freshwater Bayou's navigability was destroyed when the Corps of Engineers re-routed it to build the Freshwater Bayou Canal, which was built by virtue of the gratuitous granting by Respondent of a public servitude over one of its canals. No governmental authority has ever been asserted over Respondent's canals and the Corps of Engineers has recognized the private nature of the canals.

Finally, important public policy reasons exist as to why the navigation servitude should not be extended to grant access to Respondent's canals. The delicate ecological balance of the area would be endangered by excessive influx of crafts upon the water. The reality of the situation is that Petitioners do not seek to use the canal for navigation purposes, but for their own commercial uses. Such access would prevent effective management and control of the ecological system. In addition, public access would be a disincentive to those who would build canals for oil and gas exploration so desparately needed at this time. In contrast, public access would serve no navigational purposes, but only the commercial interests of Petitioners.

ARGUMENT

I.

CERTIORARI WAS IMPROVIDENTLY GRANTED, THIS COURT IS WITHOUT JURISDICTION, AND THE WRIT SHOULD THEREFORE BE RECALLED.

A. Petitioners' Claim to Rights and Privileges Under the Louisiana Organic Act Was Not Properly Raised in the State Court Proceeding and Is Therefore Not Before This Court.

Certiorari in this Court was granted based on jurisdiction under 28 U.S.C. 1257(3). That statute reads in pertinent part:

> Section 1257. State Courts; appeal; certiorari.
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed as follows:
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of...the United States.

It is essential to the jurisdiction of the Supreme Court under Section 1257 that a substantial federal question has been properly raised in the state court proceedings. In *Cardinale v. State of Louisiana*, 394 U.S. 437 (1969), this Court, in dismissing a writ of certiorari, made clear that "it was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." 394 U.S. at 438. Petitioners' claims to rights under the Louisiana Organic Act, 2 Stat. 701 et seq., were not presented in the state courts below, were not decided in those courts, and were not presented in the petition for certiorari.

The United States as *amicus curiae* on the petition for writ of certiorari recognized this problem and said: "A serious question of this Court's jurisdiction and practice is presented." [9]

Petitioners cite *Beecher v. Alabama*, 389 U.S. 35 (1967), for the proposition that the requirement of properly presenting the federal question is excused if the state courts have in fact considered the question. This proposition is inapplicable to the present case as the Louisiana courts did not in fact consider any issues under the Louisiana Organic Act. [10] The Louisiana courts were therefore not given the first opportunity to consider these issues. Petitioners' contention that the ruling of the Louisiana courts would have been the same if they had been properly presented with issues under the Louisiana Organic Act does not remedy this deficiency.

Since the applicability of the Louisiana Organic Act was neither pleaded, argued, nor decided below, that issue was not properly raised and this Court is without jurisdiction to decide those claims. "It is the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

B. A Private Right of Action Does Not Exist on Behalf of Petitioners Under The Rivers and Harbors Act in the Absence of Action by Congress or Its Delegate.

There is authority in the Second, Third and Fifth Circuits that has held there is no private right of action for a private party to bring suit under the Rivers and Harbors Act, 33

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9. Brief of the United States on the Petition for Writ of Certiorari at p. 8.

10. Appendix pp. 57a-66a.

U.S.C. 401 et seq.

This question was considered in *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F. Supp 412, (N.D. M.D., and S.D. Ala.), *aff'd., Sub Nom., Bass Anglers Sportsman Society v. Koppers Co.*, 447 F. 2d 1304 (5th Cir. 1971). In that case the private party plaintiffs were denied the right to enforce the Rivers and Harbors Act because the penalties for a violation of the Act were purely criminal. The court held that "criminal statutes can only be enforced by the proper authorities of the United States government and a private party has no right to enforce these sanctions." 324 F. Supp. at 415.

This rule was applied in *Morris v. Tennessee Valley Authority*, 345 F.Supp. 321, 324 (N.D. Ala. 1972):

> The Court only recently held that the Rivers and Harbors Act is a criminal statute enforceable only by the Department of Justice and creates no right of action in private individuals for damages or injunctions to enforce its provisions. *Guthrie v. Alabama By-Products Co.*, 328 F. Supp. 1140 (N.D. Ala. 1971), *aff'd.*, 456 F.2d 1294 (5th Cir. 1972).

The Court of Appeals for the Third Circuit has held that governmental enforcement is exclusive and that Congress did not create any civil cause of action in favor of private parties injured by any violation of the Act.

> Where Congress, in providing protectiion against private violations created no new remedy other than penal sanctions, we think it is illogical to imply that Congress intended that a violation by the State should give rise to a civil claim for damages.

> *Red Star Towing and Transportation Co. v. Department of Transportation*, 423 F.2d 104, 106 (3d Cir. 1970).

The Third Circuit rule was reaffirmed in *Loveladies Property Owners Association v. Rabb*, 430 F.Supp. 276 (D. N.J. 1975), *aff'd.*, 457 F.2d 1162 (3d Cir. 1976), *cert. cenied*, 432 U.S. 906 (1977), where the court held that the Rivers and Harbors Act did not create a private right of action. See also *Citizens Committee For Environmental Protection v. United States Coast Guard*, 456 F. Supp. 101 (D.N.J. 1978).

The Second Circuit also follows the view that the Rivers and Harbors Act does not create a private right of action. In *Hooper v. United States*, 331 F.Supp. 1056, (D. Conn.), an action against a power company, joined as a defendant with the United States, was dismissed since the "Rivers and Harbors Appropriation Act...does not create a new civil remedy and cannot be the basis for this court's jurisdiction." 331 F. Supp. at 1058. [11]

The power to prescribe laws governing the use or obstruction of navigable waters has been entrusted to Congress under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1(1824). Congress has delegated to subordinate administrative agencies, such as the Corps of Engineers, the power to determine what obstructions and improvements on which waters will be regulated under the federal power. In the present case neither Congress nor its delegate have made any determination that the waters in question are or are not navigable waters of the United States. In the absence of such

11. In the Ninth Circuit there is authority to the contrary. For example, in *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Ca. 1975) standing was granted to private party plaintiffs in a private cause of action under the Rivers and Harbors Act.

determination, the courts of Louisiana, seeking to enforce the property laws of that State, have enjoined Petitioners from trespassing upon Respondent's private property and private artificial canals built at private expense. Federal judicial interference at this stage would do violence to the two great policies which have heretofore dictated non-interference – the doctrines of comity and separation of powers.

Petitioners apparently recognize this for they seek to infer from the Rivers and Harbors Act that Congress has created a private right to pursue this action. Cases are cited in support of this proposition, but those cases are ones in which a private citizen obstructed naturally navigable waters, and Congress and the Corps of Engineers had already made a determination that such an obstruction would not be permitted. In the instant case, the waters are not natural waterways and there has been no determination that they will be treated as such. Since Congress has addrsssed this problem by granting criminal sanctions to be enforced by the Department of Justice, this Court should hold that a private right of action does not exist on behalf of these Petitioners under the Rivers and Harbors Act.

It is submitted that, for the foregoing reasons, the writ herein should be dismissed for want of jurisdiction. In the event that this Honorable Court does not find these arguments persuasive, in the alternative, it is submitted that the judgment below of the Court of Appeal for the Third Circuit of the State of Louisiana should be affirmed for the reasons set forth in the following sections of this brief.

II.

THE NAVIGATION SERVITUDE IS DISTINCT AND SEPARABLE FROM AND IS NARROWER THAN FEDERAL REGULATORY JURISDICTION.

A. Federal Power Over Navigable Waters Has Many Legally Distinct Sources and Applications.

The term "navigability" or "navigable waters" has many legally distinct sources and applications under both state and federal law. It is essential to a proper determination of the issue presented herein to recognize this and to understand that a particular body of water may be "navigable" for one purpose and not for another depending on the nature of the federal power being exercised.

> "Navigability" or "navigable waters" is the touchstone for determining many sovereign, private, and public rights in waters. A significant problem is the matter of defining "navigability". More precisely, the problem is that of clearly delineating navigability for a specific purpose at hand and distinguishing that test of navigability from other tests employed in varying contexts. Leighty, *Source and Scope of Public and Private Rights in Navigable Waters*, 5 Land and Water L. Rev. 391 (1970) at 397.

Navigability may be used to determine title controversies to the beds of lakes and streams, rights of riparian property owners, the fulfillment of treaty obligations, exercise of the war powers, the extent of admiralty jurisdiction, the validity of Congressional regulation under the Commerce clause, and the scope of public access under the navigation servitude.

There are other contexts in which the term is used but these represent the major applications. In each use the scope of federal power varies in degree.

Although concerned with the Admiralty and Commerce Clause application of "navigability", the primary concern in this case is the meaning and application of "navigability" for purposes of public access under the navigation servitude. Since the briefs of the Petitioners and of the Solicitor General as *amicus curiae* adequately review the common law history of the public right of access, Respondent feels it is unnecessary to do so again. It should suffice to say that we agree that the English concept of the "public common of piscary" was indeed carried over into an American and Federal context via the Commerce Clause of the Constitution.

What we do not agree with and what we do not believe Petitioners and the Solicitor General have adequately done is to delineate clearly the various applications and contexts in which the term "navigability" has been used in the multitude of cited cases. For this reason Respondent will attempt to present a conceptual framework in which the term "navigability" developed and is presently used in American water law.

In one of the very first cases in American Supreme Court history to consider the power of Congress vis-a-vis the states under the Commerce Clause, Chief Justice John Marshall declared: "All America understands the word 'commerce' to comprehend navigation. It was so understood . . when the Constitution was framed. The power over commerce including navigation, was one of the primary objects for which the people of America adopted their government." *Gibbons v. Ogden*, 22 U.S. (9 Wheat,) 1, 190 (1824). A half century later, after declaring the English ebb and flow of the tide test not to be "any test at all," Justice Field laid down the test

still valid today, for determining navigability.

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

This test of navigability was expanded in *The Montello*, 87 U.S. (20 Wall.) 430 (1874) where the Court stated:

> The true test of navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation . . .The capability of use by the public for the purpose of transportation and commerce affords the true criteria of the navigability of a river, rather than the extent and manner of that use . . . It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is navigable, but in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade and agriculture. 87 U.S. (20 Wall.) at 441-442.

The federal test for determining navigability reached its modern day expansive meaning in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940):

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. "Natural and Ordinary condition" refers to volume of water, the gradients, and the regularity of the flow. A waterway otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken . . . there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so. Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway suitable for traffic. 311 U.S. at 407-409.

The foregoing Supreme Court decisions enunciate an all encompassing test of navigability. However, before assessing their impact on the present controversy, one must realize that the preceding cases involved navigability as defined for Congressional regulatory power under the Commerce Clause while the question of public access under the navigation servitude was not at issue. This is but one of the distinct applications of the term "navigability" and has been used to

sustain action by Congress through its power to regulate commerce in a multitude of instances, ranging from prohibiting obstructions to navigable rivers to comprehensive flood control programs. *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690 (1899); *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1921); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. Chicago, Milwaukee, St. Paul and Pacific Railway Co.*, 312 U.S. 592 (1941); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960); *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961).

The distinct applications of the term "navigability" become readily apparent through an examination of its use in delineating the scope of admiralty jurisdiction of the United States. In fact, this is the area in which navigability has been defined and applied in its broadest possible sense. The early case of *Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1951), extended admiralty jurisdiction beyond waters meeting the English ebb and flow of the tide test to all navigable waters. Justice Clifford, in *The Steamboat Belfast v. Boon*, 74 U.S. (7 Wall.) 624 (1869), stated:

> Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants. 74 U.S. (7 Wall.) at 640.

Navigability for the purposes of admiralty jurisdiction has since been extended by this Court to include even a wholly atrificial canal completely within the body of a state and subject to the state's ownership and control. *Ex Parte Boyer*, 109 U.S. 629 (1884). "Admiralty jurisdiction is not limited to transportation of goods and passengers in interstate or foreign commerce but depends on the jurisdiction conferred in Article 3, Section 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction. This includes canals and other waters even if they be privately owned or claimed." *Mckie v. Diamond Marine Co.*, 204 F. 2d 132, (5th Cir. 1953); See also *Guinan v. Boston, Cape Cod and New York Canal Co.*; 1 F. 2d 239 (2nd Cir. 1924); *Silver Springs Paradise Co. v. Ray*, 50 F. 2d 356 (5th Cir. 1931); *The Lucky Lindy*, 76 F.2d 561 (5th Cir. 1935); *Southern Natural Gas Co. v. Gulf Oil Corp.*, 320 So. 2d 917 (La. 3rd Cir. 1975).

Other examples of the distinct and separable applications of the term "navigability" include: Title to beds of lakes and streams for federal purposes as in *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865); *Shively v. Bowlby*, 152 U.S. 1 (1894); *United States v. Holt State Bank*, 270 U.S. 49 (1926); and *United States v. Utah*, 283 U.S. 64 (1931); title to beds of lakes and streams for state purposes as in *Port of Seattle v. Oregon and Washington Railroad Co.*, 255 U.S. 56 (1921); and, riparian rights as in *Oklahoma v. Texas*, 258 U.S. 574 (1922); *United States v. Utah*, 283 U.S. 64 (1931); and *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977).

This Court explicitly recognized that the term "navigability" has legally distinct applications and meanings in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1941), when Justice Reed stated:

> Although navigability to fix ownership of the river bed or riparian rights is determined . . . as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly non-navigable. 311 U.S. at 408.

The Corps of Engineers, which has been delegated authority by Congress over navigable waters, also recognizes that the term "navigability" may have different applications and meanings. In the Corps' regulations defining "navigable waters of the United States," it is stated that "this regulation . . . is used to define authorities of the Corps of Engineers." 33 C.F.R. Section 329.1. These regulations also make clear that "precise definitions of navigable waters or navigability are ultimately dependent on judicial interpretation," but the Corps' definition "under this regulation are considered binding in regard to the activities of the Corps of Engineers." 33 C.F.R. Section 329.3

With the foregoing analysis in mind it becomes obvious that prior to reaching into the myriad of cases cited by Petitioners and the Solicitor General and pulling out a definition of navigability, it is essential first to clearly delineate for what purpose navigability will be used and then apply the proper scope of the term. The purpose behind the exercise of federal power under the Commerce Clause is of utmost importance and deserves careful analysis. In the present controversy, the only application of the term "navigability" that is before the Court is its application insofar as the federal navigation servitude is concerned.

B. The Navigation Servitude is More Limited in Purpose, Justification, and Scope Than Federal Regulatory Jurisdiction.

Although the federal navigation servitude and federal regulatory jurisdiction are both powers derived from the Commerce Clause and may have initially been coincidental in scope, only similarities exist now, as any rational limits of the navigation servitude have been far exceeded by federal regulatory power. The purpose of the navigation servitude is to preserve the nation's public waterways against private obstructions, while regulatory authority is as broad as the full power of Congress under the Commerce Clause.

The navigation servitude, carried over from English Common Law via the Commerce Clause, was preserved in the Northwest ordinance and in the various Organic Acts whereby states joined the Union. The Louisiana Organic Act, 2 Stat. 701, stated in part:

> *Provided,* that it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the inhabitants of other states and the territories of the United States, without any tax, duty, impost or toll therefore, imposed by the said state . . . 2 Stat. at 703.

This provision was characterized by Justice Field in *Hamilton v. Vicksburg, Shreveport and Pacific Railroad Co.*, 119 U.S. 280, 285 (1886) as ". . . having but one object;

namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation." See also *Huse v. Glover*, 119 U.S. 547, 548 (1886).

As this nation's commercial needs have grown, so has the definition of navigation as seen in the discussion above. The Rivers and Harbors Act, now codified at 33 U.S.C. 401 et seq., was first enacted in 1890 to prohibit unauthorized obstructions to the navigable capacity of national waters. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967). Until recent times, the Act was usually applied to regulate structures obstructing navigation on naturally navigable-in-fact waterways. *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917). "As so applied, the scope of federal regulation was comparable to the scope of the navigation servitude. In recent times, however, the extent of regulation has been greatly expanded and now far surpasses the limits of the navigation servitude." [12]

The Rivers and Harbors Act with its origin in the Commerce Clause has provided the basis for expansive regulation by Congress and the U.S. Army Corps of Engineers. Seeds of regulatory expansion were sown in *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899) wherein this Court stated:

> It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything wherever done or however

12. *Kaiser Aetna v. United States of America,* Docket No. 78-738. Petitioners' Brief at p. 40.

> done, within *the limits of the jurisdiction of the United States which tends to destroy the navigable capacity* of one of the navigable waters of the United States, is within the terms of the prohibition. (emphasis ours).174 U.S. at 708. See also *United States v. Republic Steel Corp.*, 362 U.S. 482, 487-488 (1960).

The Rivers and Harbors Act is no longer merely a statute for protection of public navigation but has been extended to cover major pollution, environmental, and conservation problems. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

Congress has further extended federal regulatory power by virtue of the Commerce Clause in the various flood control acts. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960). And federal regulatory power has been extended still further in the Federal Water Pollution Control Act of 1972, 33 U.S.C. 1251 et seq., wherein navigable waters are defined to include "the waters of the United States." The Circuit Courts have interpreted this language to include discharges into non-navigable as well as navigable streams. *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). "Congress clearly meant to extend the Act's jurisdiction to the constitutional limit . . ." *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200 (1976).

> So unfettered is this control of Congress over navigable streams of the country that its judg-

> ment . . . is conclusive, *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) at 64.

Recalling that the only issue before this Court is the proper limit of the federal navigation servitude, Respondent believes that it is essential to recognize the distinction between the servitude and Congressional power to regulate under the Commerce Clause. For this reason the position of Petitioners and of the Solicitor General that the navigation servitude goes hand in hand with federal regulatory power over "navigable waters" cannot be sustained.

This Court has on more than one occasion recognized that the navigation servitude is more limited in scope than federal regulatory jurisdiction. This premise was first hinted at in 1903 when Justice Brown, speaking of *Ex Parte Boyer*, supra and admiralty jurisdiction, said:

> It has never been overruled or questioned, and must be treated as settling the jurisdiction of the admiralty court over the waters of any artificial canal which is the means of communication between ports and places in different states and territories. *It is not intended here to intimate that, if the waters, though navigable, are wholly territorial and used only for local traffic . . . they are to be considered as navigable waters of the United States.* (emphasis ours). *Perry v. Haines*, 191 U.S. 17, 28 (1903).

More recently, and referring specifically to the navigation servitude, this Court noted the distinction between it and federal regulatory jurisdiction and emphasized the more limited nature of the navigation servitude.

> It is not the broad constitutional power to regulate commerce, *but rather the servitude derived from that power and narrower in scope,* that frees the government from liability in these cases. When the government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. (emphasis ours). *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 808 (1950).

Though this case was dealing with the issue of just compensation, it illustrates one of the most important reasons why the navigation servitude cannot be equated with full federal regulatory power under the Commerce Clause. When the federal navigation servitude lawfully attaches to a navigable water, not only does it afford a public right of access to surface waters, but it is the servitude which lawfully permits the use, dredging, flooding, or taking of the bed up to the ordinary high water mark by the government, all without compensation to property owners. *Scranton v. Wheeler,* 179 U.S. 141 (1900); *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 312 U.S. 592 (1941); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950); *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961); *United States v. Rands*, 389 U.S. 121 (1967).

The purpose of the navigation servitude was only to aid navigation. *United States v. Kansas City Life Insurance Co.*, supra; *United States v. Rands,* 389 U.S. 121, (1967). The servitude should not be enlarged beyond its purpose under the guise of federal regulatory power which has a different purpose.

> The plenary federal power over *commerce* must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 409 (1940).

When these distinctions are discerned, the irrelevance of much of the argument and citations of authority by Petitioners and the Solicitor General become obvious. They are concerned with navigability for purposes other than that at issue in this case. The only application and meaning of the term "navigability" presently at issue before this Court is its relation to the federal navigation servitude. With the purposes of the servitude in mind and the fact that it allows uncompensated takings, the navigation servitude can in no way be considered inseparable from federal regulatory jurisdiction under the broadest Commerce Clause application.

C. The Exercise of Federal Power Over Navigable Wat Is Limited by the Fifth Amendment to the U.S. Constitution.

The Fifth Amendment to the United States Constitution guarantees that "private property shall not be taken for public use without just compensation." This guarantee becomes relevant to Respondent when it is recognized that "confiscation may result from a taking of the use of the property without compensation quite as well as from taking of the title." *Chicago, Rock Island, and Pacific Railroad Co. v. United States,* 284 U.S. 80, 96 (1931). Although the navigation servitude is derived from federal power to regulate conferred by the Commerce Clause, in exercising those powers, Con-

gress must respect the private property guarantees of the Fifth Amendment.

> All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guarantees prescribed by it for the security of private property must be respected by all.
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> Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this Court has announced a rule that will embrace every case. *Scranton v. Wheeler,* 179 U.S. 141, 162, 153 (1900). See also *United States v. Cress,* 243 U.S. 316, 320 (1917); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893).

"Though the Congressional power over the regulation of commerce is far reaching, that power is limited by the due

process and taking clauses of the Fifth Amendment." *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3rd Cir. 1974). Since the navigation servitude finds its constitutional protection in the Commerce Clause, and since it is said that the Rivers and Harbors Act was enacted to protect the navigation servitude ,[13] it must be assumed that Congress intended to respect the limitations on power of the Fifth Amendment when the Rivers and Harbors Act was first enacted in 1890. Therefore, Petitioners' claim to protection under the Rivers and Harbors Act can only be sustained as to those waters subject to the navigation servitude as limited by the Fifth Amendment.

As has been previously mentioned, when the federal navigation servitude lawfully attaches to a navigable water, it not only affords a public right of access to surface waters, but also lawfully permits the use or taking of the bed up to the ordinary high water mark by the government without compensation to property owners. *Scranton v. Wheeler,* 179 U.S. 141 (1900); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950); *United States v. Rands,* 389 U.S. 121 (1967) and authorities cited therein. Since the application of the servitude may result in the loss of valuable private property rights, this Court early mandated that the limitations imposed by the Fifth Amendment must be observed. The navigation servitude should never be exercised in a Constitutional vacuum.

> The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give effect to that right, is so

13. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

> fully established and, and is so amply illustrated by recent decisions of this Court, that a mere reference to the cases will suffice (citations omitted), . . . But this rule, like every other, has its limits, and in the present cases, which require us to ascertain the dividing line between public and private right, it is important to inquire what are "navigable streams" within the meaning of the rule. *United States v. Cress*, 243 U.S. 316, 320-321 (1917). [14]

See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *United States v. Rands*, 389 U.S. 121 (1967). In *Monongahela Navigation Co. v. United States*, this Court said:

> Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. 148 U.S. at 336.

At this point it becomes relevant to review the Fifth Amendment limitations spoken of in these cases that are imposed on the exercise of the navigation servitude. Respondent submits this limitation is to be found in the waterways. natural existence. All of the authorities cited previously regarding the term "navigability" were concerned with rivers

14. This Court later limited its holding in *United States v. Cress to the facts there presented* in *United States v. C.M., St. P. and P. R. R. Co.*, 312 U.S. 592 (1941). That limitation was not directed to the Fifth Amendment limit on the exercise of the navigation servitude.

and streams wholly or in substantial part navigable in their natural condition, not waterways artifically created on private fast land. "Navigability" grew from those waters navigable-in-fact [15] to those waters capable of commerce [16] to those waters made navigable with reasonable improvements.[17] There is not a single decision of this or any other American or English Court holding that wholly artificial canals constructed on private fast land by private landowners at private expense automatically become "navigable waters of the United States" for the purpose of giving the public generally full and free access to those canals, and thus to the lands of the owners. And it can hardly be contended that constructing a canal through fast land is a "reasonable improvement" of an existing waterway.

The prior decisions dealing with artificial canals, as we have seen, hold only that such canals become "navigable waters of the United States" for the purpose of admiralty jurisdiction and Congressional regulation under the broad powers of the Commerce Clause. On the other hand the navigation servitude, "narrower in scope," allows uncompensated government taking because the owner has had "ample notice over the years that such property is subject to a dominant public interest." The owner's title to the property is therefore said to be "imperfect". *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 808 (1950).

Only fantasy would allow one to believe that the owner of fast land who has constructed a canal thereon at his own expense was on any kind of notice that his title was imperfect. While they may be subject to regulation, private property

15. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

16. *The Montello*, 87 U.S. (20 Wall.) 430 (1874).

17. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

rights cannot be taken without compensation. After recognizing that the navigation servitude is limited by the Fifth Amendment guarantees of due process and just compensation, this Court has stated:

> By an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right. *United States v. Cress*, 243 U.S. 316, 321 (1917).

Though the test of navigability in fact has grown with the needs of commerce, the limits of the Fifth Amendment still exist. It is the task of this Court to determine the present extent of those limits in relation to the navigation servitude. Respondent urges this Honorable Court to agree that artificial canals constructed with private funds in fast land privately owned lie within the protection of the Fifth Amendment limitation.

III.

THE FEDERALLY PROTECTED RIGHT OF THE PUBLIC TO NAVIGATE OVER THE NAVIGABLE WATERS OF THE UNITED STATES HAS NO APPLICATION TO RESPONDENT'S WHOLLY ARTIFICIAL CANAL SYSTEM.

A. Respondent's Artificial Canals Constructed Entirely on Private Property at Pricate Expense Are Considered Private Under State and Federal Law.

For a proper determination of what is at issue in this case it must be emphasized that the question of whether Respondent's canals are "navigable waters of the United States" is not involved. Respondent concedes that for some applications of federal power some of the canals may be so considered. The only issue presented is whether Respondent's wholly artificial canals constructed on private fast land at private expense are subject to the federally protected right of the public to navigate over the "navigable waters of the United States." This case does not involve naturally navigable waterways or improvements, reasonable or otherwise, to any kind of preexisting river, bayou, stream or pond.

Louisiana law is clear on the status of Respondent's canals and makes it clear that these canals are private property subject to the control and use of the owner. The Louisiana Court of Appeal for the Third Circuit based its decision in the opinion below on longstanding statements of Louisiana law. In the early case of *Harvey v. Potter*, 19 La. Ann. 264 (1867), the Louisiana Supreme Court held that the public does not have a right of access to a canal constructed entirely on private lands exclusively at the owner's expense. In discussing the navigation servitude and the Fifth Amendment limitations on the servitude, the court stated:

> It is not easy to perceive how, in such a case, the public become seized of the right of gratuitous use of advantages afforded by individual labor and enterprise. The right of expropriation, it is true, belongs to the public, and the land and canal so constructed upon it, might, under constitutional and

> legal provisions, become public property, and be appropriated to public use. But where no public need exists for such conversion and the property in its entirety is subjected to private ownership, it would seem that the proprietor has the right in any manner he deems best, to render that property most productive, subject only to the rule "sic utere tuo ut alienum non laedas". . . . Private property shall not be taken for public uses, without ample renumeration to the owner. This is a fundamental principle. So it would seem clearly to follow that private property cannot be used by the public without compensation for that use. 19 La. Ann. at 264-265.

Louisiana courts have had other occasions in which to make clear their position on the private ownership of artificial canals constructed on private property. In *Ilhenny v. Broussard*, 172 La. 895, 135 So. 669 (1931) and in *National Audubon Society v. White*, 302 So. 2d 660 (1974), *writ denied*, 305 So. 2d 542 (1975), the Louisiana courts held that a private artificial canal constructed on private property was not subject to public use.

> We believe that a canal built entirely on private property, with private funds and for private purposes, is a private thing, for the same reasons that a road built on private property for private purposes is a privately owned road. 302 So. 2d at 665.

In reference to these decisions, Petitioners assert that "the courts of Louisiana appear to have been on the wrong side of this issue for an extended time." (Petitioners' Brief p. 13). This statement is made after incorrectly assuming that in

each of these cases the Louisiana court concluded that "navigability in fact, relationship to interstate commerce, and, generally, all other indicators of status as navigable waters of the United States are irrelevant if waterways are privately constructed by private parties on privately owned lands." (Petitioners' Brief pp. 12-13). In the cases cited by Petitioners the issue was not whether the waterways were "navigable waters of the United States" but only if a right of free public access attached to them. As already explained, the character of waterways as "navigable waters of the United States" depends upon the intended application of that term. This becomes readily apparent when one examines the authorities cited by Petitioners in support of the proposition that the Louisiana courts are on the wrong side of the issue. The cited cases dealt with federal power to regulate under the Commerce Clause and did not involve any application of the navigation servitude. The concepts are distinct and separable and the term "navigability" does not have the same application in each.[18]

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18. Petitioners cite *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940) and *United States v. Sexton Cove Estates, Inc.*389 F.Supp. 602 (S.D. Fla. 1975), *affirmed*, 526 F.2d 1293 (5th Cir. 1976). In *Appalachian* the United States sought to enjoin a power company from constructing a dam without a permit from the Federal Power Commission. In *Sexton Cove Estates* the issue was whether a property developer must seek permits from the Corps of Engineers before engaging in dredging operations that were proven to have an adverse affect on navigable waters. Both cases involved Commerce Clause regulatory power and neither involved the application of public access under the navigation servitude. Petitioners also cite *United States v. Kaiser-Aetna*, 584 F.2d 378 (9th Cir. 1978), *certiorari granted*, Docket No. 78-738. The Court of Appeals in *Kaiser-Aetna* "took a familiar concept , i.e., all public navigable waters are subject to federal regulation, and applied it in reverse, concluding that waters subject to federal regulation are public waters subject to the federal navigation servitude." (*Kaiser Aetna v. United States*, Docket No. 78-738, Brief of the Petitioners at p. 29 and accompanying notes). As correctly pointed out by counsel for Kaiser Aetna in that case, no opinion of the Supreme Court so holds and the Ninth Circuit failed to cite authority for the proposition. Cases cited dealt with the Federal Water Pollution Control Act.

Since the right of public access emanating from the federal navigation servitude has its origin in English law and the "public common of piscary," it becomes relevant to examine just what the English law was on the subject of artificial canals constructed on private property. The Solicitor General quotes from *De Jure Maris* by Sir Matthew Hale, Lord Chief Justice during the reign of Charles II, in support of his position but in doing so omits part of Lord Hale's statement in reference to artificially constructed waters. (See U.S. Brief at page 28-29). Respondent believes Lord Hale's complete comments are relevant.

> But if any person at his own charge makes his own private stream to be passable for boats or barges either by making of locks or cutts or drawing together other streams; and thereby that river, which was his own in point of propriety, became now capable of carriage of vessels, yet this seems not to make it juris publici, and he may put it down again or apply it to his own private use. Hale, *De Jure Maris*, Part I, Chap. 3.

The Solicitor General indicates that Lord Hale's opinion did not accurately represent English law and cites *Simpson v. Attorney-General* (1904) A.C. 476, and *Case v. The Midland Railway Company*, 27 Beavan 247 (1859), to support this proposition. However, both of these cases dealt with the construction of canals and improvement of waterways under either a Parliamentary Act or a King's Charter. In both cases the instrument allowing the creation of the waterway required that they be kept open to the public. Thus the cases are inapposite. In fact, *Simpson v. Attorney-General* supports the proposition that Lord Hale's opinion did accurately represent English common law. Those commenting on the law of England since that time agree.

> It cannot be implied from the fact that a person, at his own expense, has made his private stream navigable by making locks or cuts or drawing together other streams, that the public has any rights of navigation thereover, for he may destroy it or apply it to his own private use. Earl of Halsbury, *The Laws of England*, 39:731, at p. 541 (1962); citing Hale's *De Jure Maris* and *Simpson v. Attorney General.* In accord, H. Coulson and U. Forbes, *The Law Relating to Waters*, p. 485 (4th Ed. 1924).

The precedent which is relevant to this controversy may be found in the maritime law of the nineteenth century, the time during which private canals flouished and constituted a significant method of maritime transportation in the United States. At that time it was clear that the law relating to artificial water courses was totally different from the law relating to natural streams. Although artificial waterways constructed on private land and used as a highway for commerce may be subject to federal admiralty jurisdiction and federal regulatory power, they remain private vis-a-vis the public generally and are not burdened with a servitude of navigation.

> Private canals built upon private property are subject to the control of their owners. The use of such canals being merely permissive the public acquire no vested rights therein. 6 Encyclopedia of Law and Procedure 267 (1903) at 276.

Similarly,

> A waterway which is a mere private enterprise is like a private road over which the public may be

> permitted to travel, but on which, unless dedicated to its use, it obtains no vested rights. The proprietor of a tract of land has the right to excavate, entirely within his own boundaries, and exclusively at his own expense, a canal, for the purposes of navigation, and to require payment for its use from those who choose to avail themselves of its facilities. 5 American and English Encyclopedia of law lll (1897) at 114. [19]

> But no appropriation of land or right to the flowage can be made without compensation, nor until the requirements of the law authorizing such taking have been complied with. 28 American and English Encyclopedia of Law (1895) at 1044. [20]

These nineteenth century decisions have been followed in more recent times.

> Where waters were not previously navigable, the public does not acquire the right to navigate an artificial channel made by the owners of the underlying soil. 65 Corpus Jurus Secundum, "Navigable Waters", §20, at p. 132. [21]

19. Citing: *Potter v. Indiana, etc., R. Co.*, 95 Mich. 389, 54 N.W. 956; *Ward v. Warner*, 8 Mich. 508, *Harvey v. Potter*, 19 La. Ann. 264, 92 Am. Dec. 532; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525.

20. Citing: *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. (U. S.) 101; *Farnum v. Blackstone Canal Corp.*, 1 Sumn (U.S.) 46; *Trenton Water Power Co. v. Raff*, 36 N.J.L. 336; *Ten Eyck v. Delaware, etc., Canal Co.*, 18 N.J.L. 201; 37 Am. Dec. 233.

21. Citing: *King v. Muller*, 67 A. 380, 73 N.J. Eq. 32; *Fairchild v. Kraemer*, 204 N.Y.S. 2d 823, 11 A.D. 2d 232. See also 12 C.J.S. "Canals", §. 31; 13 Am. Jur. 2d, "Navigable Waters", §. 92.

Though this Court has applied federal admiralty jurisdiction and regulatory power to other than natural waterways, the navigation servitude has never been applied to artificial canals constructed on fast land. In fact the servitude has never been applied to non-navigable waters without an express determination by Congress that inclusion was essential to a comprehensive navigable waters improvement program. *United States v. Cress*, 243 U.S. 316, 325-326 (1917). It becomes more important than ever to recognize that the navigation servitude is not coextensive with Commerce Clause regulatory authority.

Veazie v. Moor, 55 U.S. (14 How.) 568 (1852), though not directly on point with the present controversy, is analogous. There the state of Maine conferred on Moore the right to improve the upper non-navigable stretches of a navigable river and to have the exclusive license to navigate the improved stretch. Veazie contested this authority since he was licensed for the coasting trade by the United States as in *Gibbons v. Ogden*.[22] In distinguishing *Gibbons v. Ogden*, this Court recognized the lack of a public right to navigate privately improved non-navigable internal streams.

> A license to prosecute the coasting trade, is a warrant to traverse the waters washing or bounding the coasts of the United States. Such a license conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a State, or the water courses partaking of the character of canals exclusively within the interior of the State, and made practicable for navigation by the funds of the state, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose

22. 22 U.S. (9 Wheat.) 1 (1824).

> like this, is, in the first place, a departure from the obvious meaning of the document itself, and an abuse wholly beyond the object and the power of the government in granting it. 55 U.S. (14 How.) at 575.

Is there any justification for believing that this same reasoning should not apply to artificial canals constructed on privately owned fast land at private expense? The private nature of artificial canals has been recognized by this Court. *Perrine v. The Chesapeake and Delaware Canal Co.*, 50 U.S. (9 How.) 172 (1850).

The United States Attorney General has also recognized the lack of a public right to navigate a state's privately improved non-navigable internal waters. In a situation involving an internal waterway in the State of Illinois, the right was recognized as to improved navigable streams. As to those parts wholly artificial, the opinion concluded:

> Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within the admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner, and deprive the latter of any return upon it. 36 Opinion U.S. Attorney General 203, 214 (1930).

Finally, regulations of the United States Corps of Engineers recognize the existence of private waterways not burdened with a public servitude. In so recognizing, the regulation points out the distinction between the servitude and federal power to regulate.

> Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private water body, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities. 33 C.F.R. § 329.8(a)(3).

The purpose of the Louisiana Organic Act and the navigation servitude was to aid navigation and to preserve the nation's natural waterways for public use. It was never intended that the owner of fast land should open his private property to public use merely because he constructed an artificial canal thereon. With the realities of South Louisiana geography, the Constitutional right to private property and Fifth Amendment protection would suffer a serious blow by any construction of the Louisiana Organic Act or the navigation servitude which extends their meaning to non-natural artificial waters. A pretension as far reaching as this is "an abuse wholly beyond the object and the power of the government granting it." *Veazie v. Moor*, 55 U.S. (14 How.) 568, 575 (1852).

B. Private Artificial Canals Which Form No Highway of Interstate Commerce Are Not Subject to the Federal Navigation Servitude Merely Because They Are Navigable In Fact and Intersect With Navigable Waters of the United States.

All of the cases that have heretofore dealt with the navigation servitude have involved natural waters, not artificially constructed canals. As early as *The Daniel Ball*, supra, which extended the term "navigable waters of the United States"

to those waters navigable-in-fact, the servitude has been confined to natural waterways. Only those rivers and streams which in their "natural" or "ordinary" condition were subject to the servitude should now be so burdened. As already noted, the broad federal powers of admiralty jurisdiction and Commerce Clause regulation could go beyond this "natural or ordinary condition" barrier, but the navigation servitude should not be so extended in the absence of other factors. The right of private property and the Fifth Amendment stand as a rigid barrier to such an extension. Citation of authority by Petitioners (Pet. Brief p. 13) and by the Solicitor General (U.S. Brief pp. 27-28) would lead this Court to believe that the navigation servitude has been extended to artificial waterways but, as has already been explained, those decisions involved application of admiralty jurisdiction or Commerce Clause regulatory power.

This Court has qualified the term "navigability" with "natural or ordinary condition" almost every time the opportunity has come up to discuss the subject. The multitude of cases cited by Petitioners and the Solicitor General support this qualification and other decisions of this Court are in accord. *Brewer Elliott Oil and Gas Co. v. United States,* 260 U.S. 77 (1922).; *United States v. Utah,* 283 U.S. 64 (1931). The federal circuit courts express agreement that "natural or ordinary condition" is a qualification of "navigability." *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F.680 (6th Cir. 1898); *Harrison v. Fite,* 148 F. 781 (8th Cir. 1906); *Gulf and Interstate Ry. Co. of Texas v. Davis,* 26 F.2d 930 (S.D. Tex. 1928); *Pennsylvania Water and Power Co. v. Federal Power Commission,* 123 F.2d 155 (App. D.C. 1941) *cert. denied,* 315 U.S. 806 (1942); *State of Utah v. United States,* 304 F.2d 23 (10th Cir. 1962), *cert denied,* 371 U.S. 826 (1962); *Leslie Salt v. Froehlke,* 578 F. 2d 742 (9th Cir. 1978); *Goose Creek Hunting Club v. United States,*

518 F. 2d 579 (Ct. Cl. 1975). The state courts are in accord. *Potter v. Indiana,* 95 Mich. 389, 54 N.W. 956 (1893); *Sneed v. Weber,* 307 S.W. 2d 681 (1958).

An additional element of the navigable-in-fact, therefore navigable-in-law rule is the waterway's role in interstate commerce.

> By navigable waters of the United States are meant such as are navigable in fact, and which by themselves or their connection with other waters form a *continuous channel* for commerce with foreign countries or among the states. (emphasis ours). *Miller v. New York,* 109 U.S. 385 (1883).

Since the origin of the federal navigation servitude and federal regulatory jurisdiction are in the Commerce Clause, it is only reasonable to require the navigable character to be in relation to interstate commerce. Therefore to be considered navigable the river or stream must form in its natural or ordinary condition an interstate highway for commerce.

Both Petitioners and the Solicitor General allege that Respondent's canal system connects with the Gulf of Mexico and other navigable waters of the United States and thereby becomes an integral part of those waterways.[23] However these statements are contrary to the record before this Court. Respondent's canal system lies in an area situated primarily between several "navigable waters of the United States." It does not connect with the Gulf of Mexico[24] and does not form a highway over which commerce may be carried on with other states. It does not "connect" two or more navigable waters of the United States. The canals form a unitary

23. Pet. Brief pp. 5, 12, 15, 16, 23; United States Brief, pp. 2, 8, 10, 28, 30).

24. Appendix pp. 33a, 43a-44a.

canal system which was built and is continuously maintained for the purpose of providing the most expeditious means of access to Respondent's leasehold .[25] All of the canals were constructed in fast land by Respondent, its lessor, or someone in privity with its lessor .[26] The canals are used by Respondent, its lessor, and its trapping, hunting, fishing and grazing lessees. Use of the canal system has always been subject to the permission of Respondent .[27] For this reason the canals are continuously posted and patrolled. [28]

Respondent's canal system is no different from private roads constructed on a farm for the purpose of planting cultivating, and harvesting crops. The fact that they intersect in some places with "navigable waters of the United States" is irrelevant since these few connections only provide an entrance into Respondent's leasehold and do not thereby cause an interstate highway of commerce to be created. The only use of the canals is by Respondent's lessor to gain access to drilling locations and by Respondent's lessees to provide access to hunting, fishing, trapping and grazing leases. The fact that canals rather than roads were built to provide access to Respondent's leasehold is only a recognition of the physical impossibility of building roads in low marsh land. Without these private artificial canals, most the land in Respondent's leasehold would be rendered inaccessible and unproductive.

The federal courts have recognized that in order to be subject to the navigation servitude the waterway must form an interstate highway of commerce. *Leovy v. United States,*

25. Id. pp. 26a, 28a, 31a, 45a.

26. Id. pp. 15a, 30a.

27. Id. pp. 16a, 39a, 42a.

28. Id. pp. 12a-14a, 16a, 51a.

177 U.S. 621 (1900); *Dow Chemical Co. v. Dixie Carriers, Inc.*, 330 F. Supp. 1304 (S.D. Tex. 1971), *aff'd.*, 463 F.2d 120 (5th Cir. 1972), *cert. denied,* 409 U.S. 1040 (1972); *Hardy Salt Co. v. Southern Pacific Transportation Co.*, 501 F.2d 1156 (10th Cir.) 1974), *cert. denied,* 419 U.S. 1033 (1974); *Minnehaha Creek Watershed District v. Hoffman*, 449 F. Supp. 876 (D. Minn. 1978), *aff'd.*, 13 E.R.C. 1009 (8th Cir. 1979).[29] Respondent's canals provide access into the interior of Respondent's leasehold and that is all. They are not transformed into an interstate highway of commerce because the owner uses them "as access to navigable waters of the United States for the carriage of his own goods any more than using a private driveway for access to public highways by motor vehicle traffic can be said to grant public access to the driveway."[30]

29. The Solicitor General cites *United States Geophysical Co. v. Vela,* 231 F.2d 816 (5th Cir. 1956), for the proposition that Respondent's canals have become an integral part of navigable waters of the United States by virtue of their intersection with such waters. However that case dealt with admiralty jurisdiction over an artificial canal that in fact supported interstate commerce. Petitioners seem to place great reliance on *United States v. Sexton Cove Estates,* 526 F.2d 1293 (5th Cir. 1976), which we have already distinguished as having involved Corps of Engineers regulatory authority. In a case decided the same day as *Sexton Cove Estates* the Fifth Circuit explained its decision in that case by saying:

> As we have this day explicated in *United States v. Sexton Cove Estates*. . ., the Corps *may* under certain circumstances exercise jurisdiction over dredging and filling operations above mean high tide line under Section 403 of the Rivers and Harbors Act. *Prerequisite for such jurisdiction are factual circumstances showing some effect upon navigable waters*, some alteration or modification of either course, location, condition or capacity of those waters. (emphasis ours). *United States v. Joseph G. Moretti Co.*, 526 F.2d 1306, 1309 (5th Cir. 1976). See also *United States v. President, etc., of Jamaica and R. Turnpike Co.*, 204 F.759 (2d Cir. 1913).

30. *Vaughn v. Vermilion Corporation,* Docket No. 77-1819, Louisiana Landowners Association Brief note 7 at p. 14.

Finally, it is alleged by Petitioners that since Respondent's Canals are subject to the ebb and flow of the tide, they thereby become "navigable waters of the United States" and are burdened with the navigation servitude. It is undisputed that Respondent's Canals exhibit some tidal action.[31] However this is but a reality in the low lying marsh areas of Louisiana's coast. The origin of the ebb and flow of the tide test was in English law and served a purpose suited for English geography. *Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). The test was early declared not to be "any test at all" by this Court. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

The rejection of the ebb and flow of the tide test is illustrated further by this Court's decision in *Leovy v. United States*, 177 U.S. 621 (1900), where the Court considered the navigability of Red Pass in the Mississippi River delta. The Court considered the issue entirely in terms of navigable-in-fact and did not suggest that any tidal portion of the pass would for that reason be considered navigable. The lower federal courts are in accord that the ebb and flow of the tide does not provide a valid test of navigability. *United States v. American Cyanamid Co.*, 354 F. Supp. 1202 (S.D. N.Y. 1973), *aff'd.*, 480 F. 2d 1132 (2d Cir. 1973); *United States v. Sexton Cove Estates*, 526 F.2d 1293 (5th Cir. 1976).

The Corps of Engineers has attempted to extend its regulatory authority over all waters, artificial or otherwise, which are subject to the ebb and flow of the tide by declaring such to be navigable waters of the United States. *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3rd Cir. 1974), *cert denied*, 420 U.S. 927 (1975), approved of such an extension as to a tidal saltwater marsh, but in relation to an artificial canal, in *United States v. Sexton Cove Estates*, the Fifth Circuit said:

31. Appendix p. 47a.

> Exhibition of tidal fluctuation subsequent to excavation does not prove alteration or modification of course, condition, location, or capacity. If it did, every hole dug in South Florida would be within the Corps' jurisdiction. The Corps' jurisdictional fingers do not reach that far. 526 F.2d at 1299 (1976).

However, the Corps recognizes that its regulatory jurisdiction and the navigation servitude are not co-extensive for its regulations concede that "a privately constructed and operated canal" not used in interstate commerce remains private. 33 C.F.R. § 329.8(a)(3).

Respondent's wholly artificial canal system constructed on private fast land at private expense did not become subject to a right of public access or navigation servitude merely because it is navigable-in-fact, exhibits some tidal action and connects in some places with "navigable waters of the United States". No decision of this Court has ever held otherwise and Respondent asks this Honorable Court to rule likewise.

C. Respondent's Canal System Did Not Destroy or Obstruct Navigable Waters of the United States and This Issue Is Not a Disputed Fact.

Petitioners claim that "at all times in this litigation" they "have alleged that the old Freshwater Bayou, on and prior to the time of the development" of Respondent's artificial canals "existed in a natural state" and "was a natural and actual marine highway of commerce" and "became unusable only when" Respondent's "ancestors in title built the artificial navigable waterways in the area."[32] The Solicitor Gener-

32. Petitioners' Brief pp. 6-7.

al asserts that it is "the unchallenged fact in this case" that a natural navigable waterway was impaired and allowed to silt up as a result of cutting a new channel off an existing waterway.[33] Respondent takes issue with these statements. This allegation does not represent an "unchallenged fact" for the precise reason that it is not so, has not been alleged at all times in this litigation, and no direct evidence in the record supports this assertion.

When Respondent originally filed suit for an injunction prohibiting Petitioners from trespassing in Respondent's private artificial canals, Petitioners answered alleging that these canals were subject to a public right of access by virtue of the navigation servitude. Their allegation that natural waterways were obstructed or destroyed was not pled as an affirmative defense as required by Louisiana Code of Civil Procedure Article 1005.[34] The first time Petitioners made any mention of obstruction or destruction of naturally navigable waters was by an affidavit in opposition to Respondent's Motion for Summary Judgment filed shortly before the day on which the motion was heard. A review of the affidavit signed by the Petitioners reveals that the affidavit does not state specific facts within Petitioners' personal knowledge that raise material issues for trial as required by Louisiana Code of Civil Procedure Article 967. Furthermore, the affidavit was not made on personal knowledge as required, Petitioners only alleging that they "are aware that ...."

The Solicitor General states that "Petitioners' claim that the maintenance of the canal system destroyed the prior channel was rejected as a matter of law as an insufficient

33. United States Brief p. 31.

34. Appendix pp. 8a-10a.

defense and must be taken as true at this stage in the proceedings."[35] Petitioners would likewise have the Court believe this.[36] Respondent contends that this is patently incorrect. The Louisiana Court of Appeal for the Third Circuit rejected the defense of possible obstruction or destruction of natural waterways based on *Ilhenny v. Broussard*, 135 So. 669 (La. 1931). That case held that the subject matter of diverting the water of a navigable stream had been placed by Congress under the jurisdiction of the Secretary of War and it was not for the Louisiana court to fashion such a remedy as providing access in the new channel. *Vermilion Corporation v. Vaughn*, 356 So. 2d 551 (1978) at 554.[37]

The fact remains that this assertion is not unchallenged and cannot be accepted as true since it was not raised by Petitioners in their answer. Even if properly raised the issue is not free from doubt. The record before this Court supports the contrary. Little Freshwater Bayou, a drainage coulee, was silted up by "accretion caused by the westerly current and bringing the silt from the Atchafalaya River west-

35. United States Brief, Note 4 at p. 4.

36. Petitioners' Brief p. 7.

37. Petitioners cite this Court's opinion in *Huse v. Glover*, 119 U.S. 543 (1886), and claim that it inferentially supports the proposition that a private party cannot retain exclusive use of a canal that renders a natural channel unusable (Pet. Brief p. 18). *Huse v. Glover* is inapposite. It dealt with the authority of a state to improve a natural waterway and charge tolls for the use of the improvements. *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) and *Dwinel v. Barnard*, 28 Me. 554 (1848) cited by the Solicitor General are also inapplicable. (U.S. Brief p. 31). *Philadelphia Co. v. Stimson* involved an attempt by a state to restrict the public right of navigation to within the river's ancient lines which the Court said did not destroy Congressional right to regulate. *Dwinel v. Barnard* did in dicta say that when a natural stream is obstructed the public should have the same access as they had before; however, the Court found that there had been no obstruction and properly held that a person who constructs a private watercourse may withhold its use from the public.

ward."[38] The development of Respondent's Dewitt Canal "would not have had any effect on that."[39] At any rate this "drainage coulee" never supported any traffic other than trappers in pirogues.[40]

The only other natural waterway in the area was Freshwater Bayou which terminated at Boat Point, on lands owned by Respondent's lessor.[41] Although Freshwater Bayou may have been navigable at one point in time,[42] the Corps of Engineers incorporated this bayou into the Freshwater Bayou Canal which was developed between 1964 and 1968. Respondent and Respondent's lessor granted a servitude by gratuitous donation to the Corps of Engineers in 1962 to construct a new route from Intercoastal City to the Gulf of Mexico. This project incorporated and re-routed portions of natural Freshwater Bayou with Six Mile Canal and Belle Isle Canal to form Freshwater Bayou Canal. Freshweater Bayou Canal is a "navigable water of the United States" and is subject to a public right of access all by virtue of Respondent's gratuitous donation.[43] What was originally the entrance to Freshwater Bayou from the Gulf of Mexico was converted into a spoil disposal area and completely blocked by the Corps of Engineers in connection with their construction of Freshwater Bayou Canal. Any natural navigability of Freshwater Bayou was destroyed when the Corps of Engineers re-routed it and constructed Freshwater Bayou Canal.

38. Appendix p. 33a.

39. Id.

40. Id. p. 34a.

41. Id. p. 35a.

42. Id.

43. Id. pp. 35a-38a.

No state or federal governmental agencies have ever attempted to assert dominion, control or public access on any of Respondent's canals.[44] The Corps of Engineers did not assert any type of servitude when plans were made to construct Freshwater Bayou Canal. The Corps asked for a servitude and it was donated to them by Respondent and Respondent's lessor. It was the donation of the servitude and the subsequent construction of Freshwater Bayou Canal that has caused Respondent's canals to intersect with "navigable waters of the United States" in as many places as they do. Permits from the Corps of Engineers have always been sought before connecting any artificial canals with "navigable waters of the United States."[45] The Corps has always recognized the private nature of Respondent's canals and has never asserted any rights of public access over the canal system.[46]

44. Id. pp. 48a.

45. United States Brief note 18 at p. 32.

46. The Solicitor General points to language in the Corps of Engineers' permits regarding Respondent's canal which provides that "no attempt shall be made by the permittee or owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure." (U.S. Brief at Note 18, p. 32). The Solicitor General interprets this language as allowing public access in all of Respondent's canals. The fallacy of this argument is clear beyond any doubt. As previously noted, neither the Corps of Engineers nor any other state or federal government or agency has ever attempted to interfere with the private nature of Respondent's canals. The Corps' permit referred to was issued to allow Respondent's lessor to connect one of the private artificial canals involved with a "navigable water of the United States" which may have been burdened with the navigation servitude. Thus the quoted permit language, when requiring free public access "at or adjacent to the work or structure," refers to those intersection or connection points as the "work or structure" not the entire private canal system leading into the interior of Respondent's leasehold.

IV.

THERE ARE COMPELLING POLICY CONSIDERATIONS WHY THE FEDERAL NAVIGATION SERVITUDE SHOULD NOT BE EXTENDED TO RESPONDENT'S PRIVATELY CONSTRUCTED CANAL SYSTEM UPON ITS PRIVATE LANDS.

For the reasons detailed in the foregoing portions of this brief, the judgment of the Louisiana courts is correct as a matter of law and should be affirmed. In addition, the general rule that law does not grow out of a vacuum, but is responsive to practical needs and considerations, is applicable and there are compelling practical and policy reasons which fortify this conclusion.

The canal system to which public access is herein sought by Petitioners for their private economic gain is located in a 125,000 acre tract of land leased by Respondent on the southern coast of Louisiana along the Gulf of Mexico.[47] Louisiana has over four million acres of marshland scattered along the state's relatively undefined coast. There is urgent need for maintaining these marshlands as a habitat for fish and wildlife.

In common with other land along this coast, Respondent's leasehold is characterized by a fragile ecology subject to disturbance by natural forces such as frequent flooding and a tremendous amount of silt carried into the Gulf of Mexico by the Atchafalaya River, which drains one-third of the flow of the Mississippi River, much of which finds its way back into these marshes, and general erosion caused by both natural and man-made phenomena. These lands are generally

47. Appendix p. 50a.

recognized to be a unique natural resource as a habitat for fish and wildlife; this recognition is reflected in a general consensus that their survival should be protected by careful management.

This consensus is most clearly evidenced by the fact that many thousands of Louisiana's coastal marshlands are currently under a water management program providing a habitat for migratory water fowl, fur-bearing animals and the North American alligator. Implementation of this program requires construction of levees, constant maintenance of canals, and regulation of water levels and salinity balance. The success of this program has provided feeding grounds for the greatest concentration of migratory water fowl on the Gulf Coast, the population of which far exceeds what could be sustained under natural conditions

Adjoining Respondent's Lands are two wildlife refuges – the Rockefeller Refuge and Game Preserve on the west, operated by the State of Louisiana, and the Paul J. Rainey Wildlife and Game Preserve on the east, operated by the National Audubon Society. Immediately to the east of and adjoining the National Audubon Society area is the Russell Sage Wildlife Management Area, also operated by the State of Louisiana. In all, the State of Louisiana operates thirty-five wildlife management areas with a total acreage of nearly one million acres, many of which lie within the coastal marshes of Louisiana. Water management programs are conducted on many of these wildlife refuges and management areas. See *A Guide to Wildlife Management Areas*, Louisiana Department of Wildlife and Fisheries, 1978.

In the last twenty years the increased demand in this country for energy sources has caused a rapid growth of oil and gas exploration efforts in Louisiana's coastal marshes.

This "increased tempo of oil and gas exploration, coupled with the use of the coastal marshes for inland waterways, has introduced additional water control problems to the marshland property owner. It has become necessary to maintain canal levees and construct new ones to improve the marsh or return it to its previous ecological position." Technical Report of the Louisiana Wildlife and Fisheries Commission, *Rockefeller Refuge Levee Study*, New Orleans, 1959.

Unfortunately, but realistically, the accomplishments of water and wildlife management programs must be protected against persons unconcerned with the public good by systematic and constant patrolling to prevent selfish and uncontrolled hunting, fishing and trapping and also to prevent the erosion of canal banks from wash created by excessive and reckless use of Respondent's canal system. The nature and extent of Respondent's leasehold being such that fencing is impractical and the canals providing ready access to most parts thereof, extension of the navigation servitude will as a practical matter prevent Respondent's denying access to its canal system to anyone and its ability to manage and control water and wildlife will be so severely hampered as to be virtually destroyed.

The Solicitor General's argument that "the navigating public cannot be expected to know whether the opening to navigable channels is natural or man-made" and this "would reintroduce the very evil that the navigation servitude was designed to avoid and would impose an intolerable and unworkable burden on navigation"[48] misconceives the nature of the canal system herein at issue and the use sought by Petitioners. This system does not form and is not used as a highway of commerce nor as a link in a network of highways so

48. United States Brief p. 31.

used such that the pretended evil cited by the Solicitor General would ever occur. Warning signs are prominently posted wherever Respondent's canals intersect the boundaries of Respondent's leasehold as well as throughout the system at over 400 locations, so that no one could plead uncertainty as to what bodies of water constituted Respondent's private canals. The Solicitor General's concern is wholly misplaced.[49]

Nor, as the Solicitor General argues will the price of public access be small.[50] Respondent has carefully maintained the area for hunting, trapping and fishing leases. Levees have been built to provide rich pasture land for Respondent's cattle grazing leases. Respondent's ability to patrol and enforce its leases, presently facilitated by personal acquaintance with and recognition of its lessees, will be made far more difficult, if not impossible, by the indiscriminate presence of "public" users of its canal system providing access to lease sites. Poachers will be virtually impossible to control, thus destroying the value of hunting and trapping leases and the income therefrom and protection of the animal population from unrestricted taking of wildlife. Grazing lessees will be threatened with potential loss of their cattle. The "small price" of implementing the "navigation servitude", completely inappropriate to Respondent's private canal system, could be effective destruction of Respondent's carefully preserved ecologically stable wildlife management area.

49. The court is respectfully reminded that Petitioners herein are not users who might inadvertently use Respondent's private waterways incident to their use of public waterways but are residents of the area having full and intimate knowledge of the location and extent of Respondent's canal system and desiring to exploit its resources for their private gain.

50. United States Brief p. 13.

Who will pay for the loss suffered by Respondent in throwing open its leasehold to public access? The United States has admitted in the Kaiser Aetna case that it has not budgeted a cent for the maintenance of Kuapa Pond. Is there any reason to believe the situation will be different in Respondent's case in which neither the United States nor any state or federal agency has ever expressed an interest in these private artificially constructed canals?

In addition to the adverse effect on trapping, hunting, fishing and grazing leases by extending the navigation servitude to Respondent's privately constructed and maintained canal system, there would be a disincentive to mineral development. Since access to drilling sites on Respondent's 125,000 acres -- and all similar coastal marshland areas – can be economically had only by dredging canals, potential mineral lessors would be forced to weigh the possibility of successful mineral development against the certainty of public access to their property by use of the canals to provide access to drilling sites. [51]

Finally, the increase in traffic through Respondent's canal system if thrown open to the public will seriously and significantly increase erosion of the canal banks and levees. The lands forming the banks of Respondent's canals are almost entirely alluvial and organic in nature; the consequence is that wave wash from increased and uncontrolled boat traffic will widen the canals and erode their banks and levees.[52]

51. Public access would be certain because application of the navigation servitude would occur upon dredging of the canal, without reference to whether mineral production occurred or not.

52. The danger of erosion of canal banks and levees is real and not mere speculation. In a 1961 study done for the Louisiana Wildlife and Fisheries Commission Refuge Division entitled "Erosion of Canal Banks on the Rockefeller Wildlife Refuge" this problem was studied in depth and some rather astonishing statistics compiled. This study, performed on the Rockefeller Wildlife Refuge which immediately adjoins Respondent's leasehold on the west, involved identical canal systems constructed at about the same time and by the same concerns as Respondent's. In the introduction to this study the problem is summarized:

> The oil company canals on Rockefeller Refuge are widening at an alarming rate. The average width of canals in the Humble System is now 212 percent of the original width. Canals of the Superior System are 242 percent of the original width, about 2 ½ times. The Humble System canals are currently widening at an average rate of 0.353 feet per month. Canal berms and levees in marsh areas are not resistant to erosive forces. Therefore, canals will widen in direct ratio to usage. "Erosion of Canal Banks on the Rockefeller Wildlife Refuge." Page 1.

This study concludes that canals widen primarily as a result of wave action created by boat traffic. Boat traffic in turn aggravates wind driven waves creating further erosion. The soft unstable marsh through which these canals are constructed is not resistent to erosion. "The canals have widened to the extent that the levees are now being destroyed. The average levee height is only a foot and a half above the surface of the marsh and if the system is to remain a fresh water system, future levee raising will be necessary."

An update to this 1961 study was made in 1964. The statistical information shows that in 1964 the Humble canals showed from 218% to 269% increase in initial width from their construction in 1940. In the period from 1958 to 1964 this widening increased from 27% to 49% over initial width. This last percentage information reflects a monthly erosion factor of 0.240 feet per month to 0.427 feet per month.

The canals on Respondent's property would reflect similar increases in width. The marsh and canals through which they are built are similar if not identical. Increased traffic and boat speed from 1964 to the present have no doubt increased the problem to astronomical proportions. Canals constructed in marsh will widen and become a traffic maintenance problem when subjected to extended and intensive usage. Amount of usage and boat speed are factors that the landowner has in

Since much, if not most, of the animal population of the swamps tend to inhabit the banks, such widening and erosion will reduce the fur-bearing animal and alligator populations, adversely affecting the characteristics of Respondent's lands as a wildlife refuge, and contract their habitat, directly lessening the value of Respondent's trapping and hunting leases.

As is pointed out hereinabove, the access sought in these proceedings to Respondent's privately constructed and maintained canal system is not for passage such as is traditionally associated with exercise of the navigation servitude. Rather, access is sought to permit Petitioners to conduct shrimping and fishing activities for their private gain on what the courts of Louisiana have historically and consistently held to be private property subject to the usual and customary incidents of private ownership. To open Respondent's canal system to exploitation by Petitioners for private gain, without compensation to Respondent, under the guise of invoking the servitude of navigation would be a perversion of that doctrine, unwarranted in law and indefensible in practice. Perhaps it is best to recall the admonition once given by Justice Holmes when he said:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

CONCLUSION

In conclusion, first, Petitioners' application to this court for relief is procedurally deficient because of their failure to raise a claim to rights and privileges under the Louisiana Organic Act in the state court proceeding and because no private right of action insures to their benefit under the Rivers and Harbors Act. Therefore, the writ should be dismissed.

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his control as long as his property remains private. Subjecting private property to public use emasculates the owners ability to control the usage and therefore prevent the erosion and destruction of his property.

Second, Petitioners' application lacks legal merit because the navigation servitude sought to be invoked by them is not coextensive with the Federal power to regulate the use of navigable waters, but is narrower and is limited by the constraints of due process and the necessity for compensation when private property is taken for public purposes.

Third, Respondent's canal system, having been dredged through private land, using private funds, for private purposes and having at all times been maintained and used as a private system, constitutes private property not subject to the Federal navigation servitude.

Finally, apart from and in addition to these purely legal reasons, there are compelling practical considerations militating the affirmance of the judgment of the Louisiana Court of Appeal for the Third Circuit.

For all of these reasons, the judgment sought to be reviewed should be affirmed.

Respectfully submitted,

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